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SURVIVING THE "PRETEXT" STAGE OF MCDONELL DOUGLAS: SHOULD EMPLOYMENT DISCRIMINATION AND RETALIATION PLAINTIFFS PROVE "MOTIVATING FACTORS" OR BUT-FOR CAUSATION?

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I. INTRODUCTION

Employment discrimination is notoriously hard to prove.[1] From the scarcity of evidence[2] to the skepticism of jurors,[3] plaintiffs in employment discrimination or employment retaliation cases face an uphill battle to prove that a discharge or demotion was caused by unlawful animus. Fortunately for Minnesota plaintiffs, however, Minnesota courts have long employed a causation test that is more plaintiff-friendly than the norm under many federal statutes. Under the burden-shifting test established in *McDonnell Douglas Corp. v. Green*,[4] and adopted under many Minnesota workplace statutes, plaintiffs can demonstrate causation simply by demonstrating that unlawful animus was a "motivating factor" in an employment decision.[5] This standard is less stringent than the standard typically employed under federal statutes such as the Age Discrimination in Employment Act (ADEA), which requires plaintiffs to show that unlawful animus was the "but-for" cause of an employment decision.[6]

Nonetheless, Minnesota and federal cases have sometimes blurred the line between Minnesota's relaxed standard and the more stringent but-for standard. Some Minnesota cases have applied a functional "but-for" test by requiring plaintiffs to prove that an employer had *no* motive besides unlawful animus.[7] The Eighth

1. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 558 (2001).

2. *Id.* at 570.

3. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 556 (2003).

4. 411 U.S. 792 (1973).

5. McGrath v. TCF Bank Savs., 509 N.W.2d 365, 366 (1993).

6. Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78 (2009).

7. *See, e.g.*, Schmidgall v. FilmTec Corp., No. CX-01-1722, 2002 WL 655680, at *3–4 (Minn. Ct. App. Apr. 23, 2002), *aff'd on other grounds*, 644 N.W.2d 801 (Minn. 2002) (reversing district court's determination that employee could not demonstrate retaliation because retaliatory animus was not the sole cause of employee's discharge), *aff'd on other grounds*, 644 N.W.2d 801 (Minn. 2002).

Circuit routinely applies a similar test to discrimination and retaliation claims arising under Minnesota law.[8]

Clarity is needed from Minnesota's courts or its legislature regarding the applicable causation standard for discrimination and retaliation claims under Minnesota law. The motivating-factor test is preferable to the but-for test in view of the employee-protective policies underlying Minnesota's workplace discrimination and retaliation statutes. A motivating-factor standard also better accounts for the practical reality that employers often have multiple reasons for making a single employment decision.[9]

II. DEVELOPMENT OF THE MCDONNELL DOUGLAS TEST AND CAUSATION STANDARDS UNDER FEDERAL LAW

Numerous federal workplace statutes prohibit employers from discriminating against employees based on characteristics such as age, pregnancy, race, and gender, and from retaliating against them based on statutorily-protected conduct such as whistleblowing. The best-known federal antidiscrimination statutes are Title VII of the Civil Rights Act of 1964,[10] the Americans with Disabilities Act (ADA), [11] and the Age Discrimination in Employment Act (ADEA). [12] Others include the Pregnancy Discrimination Act (PDA), which amended Title VII to include pregnancy discrimination as a type of sex discrimination;[13] the Uniformed Services Employment and Reemployment Rights Act (USERRA), which promotes reemployment of employees returning from active military duty;[14] the Genetic Information Nondiscrimination Act (GINA), which prohibits employers from taking adverse action

8. *See, e.g.*, Naguib v. Trimark Hotel Corp., 903 F.3d 806, 811–12 (8th Cir. 2018); Pedersen v. Bio-Medical Applications of Minn., 775 F.3d 1049, 1056 (8th Cir. 2015).

9. *See* Anderson v. Hunter, Keith, Marshall, & Co., 417 N.W.2d 619, 626 (1988) (a but-for test permits employers who engage in unlawful discrimination to escape liability by proving that "other legitimate reasons may coincidentally exist that could have justified" the employer's discriminatory action).

10. 42 U.S.C. §§ 2000e–2000e-17 (1964).

11. *Id.* §§ 12101–12213 (1990).

12. 29 U.S.C. §§ 621–634 (1967).

13. Pub. L. No. 95–555, 92 Stat. 2076 (codified as 42 U.S.C. § 2000e-(k) (1976 & Supp. 1 1978)).

14. 38 U.S.C. §§ 4301–4335 (1994).

against employees because of genetic information;[15] and the Rehabilitation Act, which prohibits disability-based discrimination in federally-funded programs and institutions.[16] Other federal statutes, such as the Fair Labor Standards Act (FLSA)[17] and the Family and Medical Leave Act (FMLA),[18] forbid retaliation against employees who engage in statutorily-protected conduct such as participating in workplace investigations or taking medical leave.[19]

All of these workplace statutes protect employees' civil rights in the workplace. However, they are more complex than typical tort claims[20] because they involve not only an employer's actions, but also its motivations.[21] An employment discrimination or retaliation plaintiff must generally prove not only that his employer acted in a certain way (for example, by discharging him), but that the employer acted *for the wrong reasons* (discriminatory or retaliatory animus).[22] This makes discrimination and retaliation claims different from typical tort actions such as negligence, where a plaintiff need only prove objective factors like causation and damages. In a discrimination or retaliation case, a plaintiff must at

15. 42 U.S.C. §§ 2000ff–2000ff-11 (2008).
16. 29 U.S.C. §§ 701–797 (1973).
17. *Id.* §§ 201–219 (1938).
18. *Id.* §§ 2601–2654 (1993).
19. *See id.* § 218c(a); *see also id.* §§ 2612(a), 2615(a).
20. Scholars have questioned whether federal civil-rights laws should be characterized as tort laws. *See, e.g.*, Sandra F. Sperino, *Discrimination Statutes, the Common Law, and Proximate Cause*, 2013 U. ILL. L. REV. 1 (2013); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007). Nonetheless, the United States Supreme Court has characterized USERRA as a federal tort law, *see* Staub v. Proctor Hosp., 562 U.S. 411, 417 (2011), and drew heavily on tort-law concepts of agency and causation to decide a question of vicarious liability under Title VII, *see generally* Burlington Indus. v. Ellerth, 524 U.S. 742 (1998). It characterized Title VII's retaliation provisions as tort claims. Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 346 (2013). State courts have routinely treated employment retaliation as a tort. *See, e.g.*, Ackerman v. Iowa, 913 N.W.2d 610, 618 (Iowa 2015) (citation omitted); Abraham v. Cty. of Hennepin, 639 N.W.2d 342, 352 (Minn. 2002), *aff'd in part and rev'd in part on other grounds*, 639 N.W.2d 342 (Minn. 2002); Continental Coffee Products Co. v. Cazarez, 937 S.W.2d 444, 453 (Tex. 1996); Chavez v. Manville Prods., 777 P.2d 371, 377 (N.M. 1989).
21. *See* Anastasia Niedrich, *Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections*, 18 MICH. J. GENDER & L. 25, 52 (2011) (citations omitted).
22. *Id.* at 52–54.

least raise an inference about a *subjective* factor—an employer's motivation for treating the plaintiff in a certain way.[23]

Recognizing the difficulty of directly proving an employer's subjective motivation, in *McDonnell Douglas*, the United States Supreme Court established a burden-shifting test by which a plaintiff may create an inference of subjective motivation.[24] The test has three stages. At the first stage, the plaintiff makes out a prima facie case of discrimination or retaliation.[25] For discrimination, the prima facie case generally involves showing that the plaintiff had a protected characteristic (such as age over forty or membership in a racial minority), that she was qualified for or was satisfactorily performing her job duties, and that she suffered an adverse employment action (such as discharge or failure to hire).[26] For retaliation, the prima facie case typically requires a plaintiff to show statutorily-protected activity (such as whistleblowing or reporting harassment), an adverse employment action (such as a discharge or demotion), and a causal connection between the two.[27] Second, the employer may proffer a nondiscriminatory or nonretaliatory explanation for the adverse action.[28] Finally, the employee has a chance to show that the employer's proffered reason was pretext.[29] While the *McDonnell Douglas* test originated under Title VII, the test has been applied under several other federal workplace antidiscrimination laws and antiretaliation laws.[30]

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23. *Id.*; *see also* Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L REV. 211, 229–30 (1992).

24. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973).

25. *Id.* at 802.

26. *See, e.g.*, Bonilla-Ramirez v. MVM, Inc., 904 F.3d 88, 94 (1st Cir. 2018) (citations omitted); Faulkner v. Douglas Cty., 906 F.3d 728, 732 (8th Cir. 2018) (citing Pye v. Nu Aire, Inc., 641 F.3d 1011, 1019 (8th Cir. 2011)); Roberson-King v. Louisiana Workforce Comm'n, 904 F.3d 377, 381 (5th Cir. 2018) (citations omitted).

27. *See, e.g.*, Gillispie v. RegionalCare Hosp. Partners, 892 F.3d 585, 593 (3rd Cir. 2018) (citing Daniels v. Sch. Dist. of Phila., 776 F.3d 181, 193 (3rd Cir. 2015)); Rutledge v. SunTrust Bank, 262 F.Appx. 956, 969 (11th Cir. 2008) (citations omitted).

28. *McDonnell Douglas*, 411 U.S. at 802.

29. *Id.* at 804.

30. *See, e.g.*, Young v. United Parcel Serv., Inc., 135 S.Ct. 1338, 1353 (2015) (PDA); Raytheon Co. v. Hernandez, 540 U.S. 44, 51–52 (2003) (ADA); Batson v. Salvation Army, 897 F.3d 1320, 1328–29 (11th Cir. 2018) (retaliation under

The first stage of the *McDonnell Douglas* test—the prima facie stage—presents a relatively low hurdle for plaintiffs. Its key elements are that the plaintiff suffered an adverse employment action and that "the most common explanations for an adverse employment action, such as incompetence, are not applicable."[31] A plaintiff will generally have firsthand knowledge if he has suffered an adverse employment action, such as a demotion or a discharge. Additionally, requirements at the prima facie stage are intended to be *de minimis,* since the purpose of the prima facie stage is merely to create a rebuttable presumption of discrimination or retaliation.[32] The employer's burden of production is even lighter. The employer must merely articulate a nondiscriminatory or nonretaliatory reason for its actions and is not yet subject to any credibility analysis.[33] Accordingly, the critical stage of the *McDonnell Douglas* test is the third stage, commonly called the "pretext stage."[34] At this stage, the credibility of the employer's asserted reason is tested against the strength of the presumption created by the plaintiff's prima facie case.[35] The plaintiff can prevail "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."[36]

The recent trend under federal statutes has been to impose a but-for test at the pretext stage—that is, to require the plaintiff to show that the adverse action would not have occurred *but for* the

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the FMLA); Ortiz v. City of San Antonio Fire Dep't, 806 F.3d 822, 827 (5th Cir. 2015) (finding no error where a district court used *McDonnell Douglas* to analyze a claim of retaliation under the GINA); Conner v. Schnuck Mkts., Inc., 121 F.3d 1390, 1394 (10th Cir. 1997) (citations omitted) (retaliation under the FLSA); Burns v. City of Columbus, 91 F.3d 836, 843 (6th Cir. 1996) (Rehabilitation Act).

31. Hutson v. McDonnell Douglas Corp., 63 F.3d 771, 776 (8th Cir. 1995) (citing Krenik v. Cty. of Le Seuer, 47 F.3d 953, 958 (8th Cir. 1995)).

32. Development in the Law: Employment Discrimination, *Shifting Burdens of Proof in Employment Discrimination Litigation*, 109 HARV. L. REV. 1579, 1587 (1996).

33. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993); *see also Shifting Burdens*, *supra* note 32, at 1587 ("[T]his second stage is little more than a mechanical formality; a defendant, unless silent, will almost always prevail" (citing *Hicks*, 509 U.S. at 510–11)).

34. *Shifting Burdens*, *supra* note 32, at 1581.

35. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

36. *Id.*

employer's discriminatory or retaliatory animus.[37] Justifications for the but-for test vary. For example, under the ADEA, the Supreme Court has based its logic on the statutory text, holding that the ADEA's prohibition on discrimination "because of" age means that discrimination must be a but-for cause of the employer's actions.[38] Federal appellate courts have applied the same analysis to the ADA.[39] On the other hand, in deciding that Title VII retaliation requires but-for causation, the Supreme Court looked to statutory-construction principles.[40]

Notably, the "but-for" standard does not apply to discrimination claims under Title VII.[41] While the but-for standard originally applied to all causes of action under Title VII,[42] in 1991, Congress enacted a more relaxed "motivating-factor" standard for claims of discrimination under Title VII.[43] The motivating-factor standard is specific to Title VII and does not apply to other federal statutes. Retaliation plaintiffs under Title VII must still meet the but-for standard.[44]

One final note on federal statutes is needed to clarify the difference between so-called "single-motive" and "mixed-motive" cases. Federal case law has sometimes distinguished between "mixed-motive" cases—where an employer had multiple reasons for taking a particular action—and "single-motive" cases.[45] While

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37. *See, e.g.*, Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 343 (2013) (retaliation under Title VII); Batson v. Salvation Army, 897 F.3d 1320, 1328–29 (11th Cir. 2018) (retaliation under the FMLA); Gentry v. E. W. Partners Club Mgmt. Co., 816 F.3d 228, 235–36 (4th Cir. 2016) (citations omitted) (ADA); Conner v. Schnuck Mkts., Inc., 121 F.3d 1390, 1394 (10th Cir. 1997) (retaliation under the FLSA). Notably, the Seventh Circuit has interpreted Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009), as mandating a default but-for causation for all federal claims where the controlling statute does *not* incorporate explicit motivating-factor language. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961–62 (7th Cir. 2010) (quoting Fairley v. Andrews, 578 F.3d 518, 525–26 (7th Cir. 2009) (en banc)).

38. *Gross*, 557 U.S. at 176–78.

39. *Gentry*, 816 F.3d at 235–36; *Serwatka*, 591 F.3d at 961–62 (7th Cir. 2010).

40. *Nassar*, 570 U.S. at 354.

41. *See* 42 U.S.C. § 2000e-2(m); *see also Nassar*, 570 U.S. at 343.

42. *See Nassar*, 570 U.S. at 348 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989)).

43. Pub. L. 102–166, 105 Stat. 1075 (1991).

44. *Nassar*, 570 U.S. at 360.

45. *See, e.g.*, *Price Waterhouse*, 490 U.S. at 246–47.

the applications of the *McDonnell Douglas* test in each situation are beyond the scope of this article, the difference is irrelevant for purposes of comparison with Minnesota law, because Minnesota does not distinguish between mixed-motive and single-motive cases when applying the *McDonnell Douglas* test.[46]

III. ADOPTION OF THE MCDONNELL DOUGLAS TEST AND DEVELOPMENT OF CAUSATION STANDARDS UNDER MINNESOTA LAW

Like federal law, Minnesota has enacted numerous statutory schemes to combat workplace discrimination and retaliation. The Minnesota Human Rights Act (MHRA)[47] prohibits workplace discrimination based on "race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, familial status, membership or activity in a local commission, disability, sexual orientation, or age."[48] The MHRA also prohibits retaliation against employees who engage in statutorily-protected conduct, such as participating in a workplace investigation.[49] The Minnesota Workers' Compensation Act (MWCA)[50] prohibits retaliation against employees who seek workers' compensation benefits,[51] and the Minnesota Whistleblower Act (MWA) prohibits retaliation against employees who report their employers' lawbreaking to governmental or law enforcement officers.[52]

Minnesota has adopted the *McDonnell Douglas* test for cases involving workplace discrimination or retaliation, including cases arising under the MHRA,[53] the antiretaliation provisions of the MWCA,[54] and the MWA.[55] Minnesota courts have noted that the test translates easily to these state-law causes of action, since the

46. *See* Pinson v. Grazzoni Bros. & Co., No. A03-1567, 2004 WL 1254117, at *7 (Minn. Ct. App. May 28, 2004) (citing Anderson v. Hunter, Keith, Marshall, & Co., 417 N.W.2d 619, 626–27 (Minn. 1988)).
47. MINN. STAT. §§ 363A.01–363A.44 (2018).
48. *Id.* § 363A.08, subdiv. 2.
49. *Id.* § 363A.15.
50. *Id.* §§ 176.001–176.862.
51. *Id.* § 176.82.
52. *Id.* § 181.932.
53. *See* Sigurdson v. Isanti Cty., 386 N.W.2d 715, 721 (Minn. 1986).
54. Randall v. N. Milk Prods., Inc., 519 N.W.2d 456, 459 (Minn. Ct. App. 1994).
55. *See* McGrath v. TCF Bank Savs., 502 N.W.2d 801, 807 (Minn. Ct. App. 1993), *aff'd*, 509 N.W.2d 365 (Minn. 1993).

state-law antidiscrimination and antiretaliation provisions resemble the causes of action in Title VII, for which the *McDonnell Douglas* test was created.[56]

However, unlike several of their federal counterparts, Minnesota's laws do not incorporate a but-for causation test at the *McDonnell Douglas* pretext stage.[57] Instead, the Minnesota Supreme Court has held that plaintiffs need only show that an improper animus "more likely than not" motivated the adverse employment action.[58] Motivating-factor causation requires the plaintiff to show that discriminatory animus was *a* factor—but not necessarily the only factor—in an employer's action which is challenged as discriminatory or retaliatory.[59] The court has twice rejected the but-for test on public-policy grounds, first in *Anderson v. Hunter, Keith, Marshall, & Co.*[60] and later in *McGrath v. TCF Bank Savings, FSB*.[61]

In *Anderson*, a discharged employee alleged that her discharge was based on pregnancy, marital status, and sex discrimination in violation of the MHRA.[62] The plaintiff's former employer claimed that the discharge was performance-based.[63] The employer noted serious performance issues in the plaintiff's work history, including misappropriation of the employer's coupons to the plaintiff's family members and billing delays which exposed the employer to liability.[64] The trial court found both parties credible.[65] The trial court held the employer liable for discrimination under the MHRA, despite its coexisting lawful motives for discharging the plaintiff.[66]

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56. Danz v. Jones, 263 N.W.2d 395, 398 (Minn. 1978) (stating that the MHRA is "appears to be modeled after Title VII"); Phipps v. Clark Oil & Ref. Corp., 408 N.W.2d 569, 571–72 (Minn. 1978); *McGrath*, 502 N.W.2d at 807.

57. *McGrath*, 509 N.W.2d at 366.

58. *Id.*

59. *See* Anderson v. Hunter, Keith, Marshall, & Co., 417 N.W.2d 619, 626 (Minn. 1988).

60. *Id.* at 626.

61. 509 N.W.2d at 366.

62. *Anderson*, 417 N.W.2d at 620–21.

63. *Id.* at 622.

64. *Id.* at 621–22.

65. *Id.* at 622.

66. *See* Anderson v. Hunter, Keith, Marshall, & Co., Inc., 401 N.W.2d 75, 80 (Minn. Ct. App. 1987, *rev'd*, 417 N.W.2d 619 (Minn. 1988) (stating that the trial court noted that "Anderson 'clearly carried her ultimate burden for persuasion and convinced the Court that, though defendant's motives were mixed,

The Minnesota Supreme Court affirmed.[67] First, the court noted that *Anderson* involved a mixed-motive claim: the trial court had credited *both* the employee's testimony that her discharge was discriminatory and the employer's testimony that the discharge was performance-based.[68] Second, the court acknowledged that federal courts at the time examined mixed-motive cases by utilizing a but-for causation standard.[69] Finally, the court held that an employer should not be able to avoid liability for discrimination simply because it had a coexisting lawful motive for an otherwise-improper employment decision.[70] A but-for test would "permit[] employers, definitionally guilty of prohibited employment discrimination, to avoid all liability for the discrimination provided they can prove that other legitimate reasons may coincidentally exist that could have justified the discharge."[71] The Minnesota Supreme Court held that such an outcome would undermine the "broad remedial purposes" of the MHRA.[72] Instead, it was sufficient for the plaintiff in *Anderson* to show that discriminatory animus was a "causative factor"—but not necessarily the only factor—in her employer's decision to discharge her.[73]

Five years later, in *McGrath*, a plaintiff brought a retaliatory-discharge claim under the MWA.[74] The Minnesota Supreme Court reiterated that an adverse action motivated by discriminatory or retaliatory animus is not made lawful simply because the employer had a coexisting lawful motive.[75] The court noted that the court of appeals had implied that an employer could survive the *McDonnell Douglas* pretext stage in a mixed-motive case simply by demonstrating a coexisting, nonretaliatory motive.[76] The court reemphasized its holding in *Anderson* and rejected the notion that

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[Anderson's] pregnancy was a discernible, discriminatory, and causative factor in defendant's discharge of [her]'").

67. *Anderson*, 417 N.W.2d at 630.

68. *Id.* at 623.

69. *Id.* at 625–27 (quoting Bibbs v. Block, 778 F.2d 1318, 1323–24 (8th Cir. 1985); Haskins v. U.S. Dep't of Army, 808 F.2d 1192, 1197–98 (6th Cir. 1987).

70. *Anderson*, 417 N.W.2d at 626.

71. *Id.*

72. *Id.*

73. *Id.* at 627.

74. McGrath v. TCF Bank Savs., 509 N.W.2d 365, 365 (Minn. 1993).

75. *Id.* at 366.

76. *Id.*

"an employer could avoid liability [for a discriminatory discharge] even if an illegitimate reason played a role in the discharge so long as the other proffered reason was not pretextual."[77]

Subsequent cases have applied *Anderson* and *McGrath* to require that plaintiffs show improper animus as a "factor," but not as a sole motivation, at the pretext stage of the *McDonnell Douglas* test.[78] *Anderson* and *McGrath* have never been overruled.

A. Application of a But-For Test at the McDonnell Douglas Pretext Stage in Minnesota Cases

Despite *Anderson* and *McGrath*'s vigorous rejection of a but-for test at the pretext stage of the *McDonnell Douglas* analysis, Minnesota courts have not always applied a true "motivating-factor" test at the pretext stage. Several district courts have applied a but-for test which has later been reversed on appeal.[79] Moreover, the Eighth Circuit applies a "determinative-factor" test to claims arising under Minnesota law which functions as a but-for test.[80]

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77. *Id.*

78. *See, e.g.*, Carter v. Peace Officers Standards & Training Bd., 558 N.W.2d 267, 272 (Minn. 1997); Temple v. Metro. Council, No. A17-0410, 2017 WL 6272716, at *9 (Minn. Ct. App. Dec. 11, 2017); Pearson v. Rohn Indus., Inc., No. A15-0477, 2015 WL 9264051, at *4–5 (Minn. Ct. App. Dec. 21, 2015); Ley v. Archdiocese of St. Paul & Minneapolis, No. C5-94-2126, 1995 WL 365472, at *2 (Minn. Ct. App. Aug. 30, 1995).

79. *See, e.g.*, Holtzman v. HealthPartners Servs., Inc., No. C7-02-375, 2002 WL 31012186, at *4–5 (Minn. Ct. App. Sept. 10, 2002); Schmidgall v. FilmTec Corp., No. CX-01-1722, 2002 WL 655680, at *2–3 (Minn. Ct. App. Apr. 23, 2002), *aff'd on other grounds*, 644 N.W.2d 801 (Minn. 2002); Abraham v. Cty. of Hennepin, No. C8-97-1907, 1998 WL 202771, at *3–4 (Minn. Ct. App. Apr. 23, 1998), *aff'd in part and rev'd in part on other grounds*, 639 N.W.2d 342 (Minn. 2002).

80. *See* Naguib v. Trimark Hotel Corp., 903 F.3d 806, 811 (8th Cir. 2018) (citing Pedersen v. Bio-Med. Applications of Minn., 775 F.3d 1049, 1055 (8th Cir. 2015)); Rothmeier v. Inv. Advisers, Inc., 85 F.3d 1328, 1328 (8th Cir. 1996).

1. "The" Reason Versus "a" Reason: District Courts Applying a But-For Test

a. Holtzman v. HealthPartners Services, Inc.

Joyce Holtzman was a registered nurse who was terminated by her employer, HealthPartners Services Inc., for failing to properly implement a medication protocol.[81] Holtzman was sixty-one years old when she was terminated.[82] She brought a lawsuit for age discrimination, alleging that she had informed HealthPartners about problems with the protocol but had been ignored.[83] Holtzman also alleged that older employees at the HealthPartners clinic where she worked were treated less favorably than—and often later replaced by—younger employees.[84]

The *Holtzman* district court relied on the Supreme Court's 1993 decision in *St. Mary's Honor Center v. Hicks*.[85] *Hicks* was a Title VII case decided before Congress amended Title VII to incorporate a motivating-factor test.[86] Accordingly, *Hicks* had applied a but-for test at the *McDonnell Douglas* pretext stage.[87] The *Holtzman* district court cited the *Hicks* but-for test: "[An employer's proffered] reason cannot be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."[88] The district court granted summary judgment for HealthPartners.[89]

The Minnesota Court of Appeals reversed.[90] The court of appeals noted that the district court's test for pretext was "not the precise standard to show pretext under Minnesota law."[91] Instead, Holtzman needed to show only that discriminatory animus "more

81. *See Holtzman*, 2002 WL 31012186, at *1 (Minn. Ct. App. Sept. 10, 2002).
82. *Id.*
83. *See id.* at *1–2.
84. *Id.* at *2.
85. *Id.* at *4 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993)).
86. *See Hicks*, 509 U.S. at 505.
87. *See id.* at 515.
88. *See Holtzman*, 2002 WL 31012186, at *5 (Halbrooks, J., dissenting) (quoting *Hicks*, 509 U.S. at 515 (emphasis in original)).
89. *Id.* at *1.
90. *Id.* at *4.
91. *Id.* at *4.

likely than not" motivated her termination.[92] The court of appeals cited *McGrath*'s formulation of the motivating-factor test as the correct test: "[E]ven if an employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason 'more likely than not' motivated the discharge decision."[93] Holtzman's case was remanded.[94]

b. Lundquist v. Rice Memorial Hospital

Rachael Lundquist was a registered nurse who was terminated by her employer, Rice Memorial Hospital, for inability to perform essential job duties.[95] Lundquist suffered a neck injury that impaired her lifting abilities.[96] Lundquist filed a workers' compensation claim but was denied coverage, placed on unrequested medical leave, terminated, reinstated, and terminated again.[97] The Hospital stated that both termination decisions were based on Lundquist's inability to perform lifting work.[98] However, Lundquist claimed that she was terminated in retaliation for filing a workers' compensation claim.[99] Lundquist brought a claim for retaliation under the MWCA.[100]

The district court characterized Lundquist's burden at the *McDonnell Douglas* pretext stage as follows: "[T]he burden then shifts back to the plaintiff to prove that this proffered reason given by [the] defendant was a pretext to cover up *the real reason* for her termination—retaliation for her receipt of workers' compensation

92. *Id.* at *5.
93. *Holtzman*, 2002 WL 31012186, at *5 (quoting McGrath v. TCF Bank Savs., 509 N.W.2d 365, 366 (Minn. 1993)).
94. *Holtzman*, 2002 WL 31012186, at *4.
95. Lundquist v. Rice Mem'l Hosp., No. A07-0683, 2008 WL 467439, at *1 (Minn. Ct. App. Apr. 15, 2008).
96. *Id.*
97. *Id.*
98. Lundquist v. Rice Mem'l Hosp., No. 34-C5-00-299, 2007 WL 5688511, Findings of Fact 16 at A-52, Findings of Fact 26 at A55 (Minn. Dist. Ct. Jan. 30, 2007).
99. *See Lundquist*, 2008 WL 467439, at *1.
100. *Id.* at *1–2.

benefits."[101] Following a bench trial, the district court granted judgment for the Hospital.[102]

Lundquist appealed, arguing that the district court had applied the wrong test for pretext.[103] The Minnesota Court of Appeals agreed that a motivating-factor test would have been proper.[104] The court of appeals cited *McGrath* for the proposition that Lundquist "[could] sustain her burden of proof by showing that 'an illegitimate reason "more likely than not" motivated the discharge decision.'"[105] Ultimately, the court of appeals upheld the district court's decision because the district court's factual findings demonstrated that Lundquist could not have prevailed even under a motivating-factor test.[106] Nonetheless, the court of appeals did not adopt the district court's reasoning that Lundquist could have only shown pretext by showing that discrimination was the single "real reason"—in other words, the but-for cause—of her discharge.[107]

c. Schmidgall v. FilmTec Corp. and Abraham v. County of Hennepin

Wanda Schmidgall worked for FilmTec Corporation.[108] She suffered three on-the-job injuries within a year.[109] FilmTec had a "same-shift reporting" policy which required employees to report any on-the-job injury during the same shift in which it occurred.[110] FilmTec terminated Schmidgall after she failed to comply with the same-shift reporting policy for the third time.[111] While it is unclear

101. *Lundquist*, 2007 WL 5688511, at Conclusions of Law 5 at A-50 (emphasis added).
102. *Id.* at Order 1 at A-48.
103. *See Lundquist*, 2008 WL 467439, at *3.
104. *See id.*
105. *Id.* (citing McGrath v. TCF Bank Savs., 509 N.W.2d 365, 366 (Minn. 1993)).
106. *Lundquist*, 2008 WL 467439, at *3.
107. *Id.*
108. Schmidgall v. FilmTec Corp., No. CX-01-1722, 2002 WL 655680, at *1 (Minn. Ct. App. Apr. 23, 2002), *aff'd on other grounds*, 644 N.W.2d 801 (Minn. 2002).
109. *Id.*
110. *See id.*
111. *Id.*

whether Schmidgall ever filed a workers' compensation claim, she brought a claim for retaliation under the MWCA.[112]

The trial court granted summary judgment for FilmTec.[113] The trial court found that because Schmidgall committed misconduct by violating the same-shift reporting policy, Schmidgall could not prevail at the *McDonnell Douglas* pretext stage.[114]

Schmidgall appealed, and the Minnesota Court of Appeals reversed.[115] First, the court of appeals examined the trial court's test for pretext.[116] It noted that the trial court had apparently assumed that Schmidgall was required to prove that retaliation was the sole cause—that is, the but-for cause—of her discharge.[117] Because misconduct was also a cause, the trial court had reasoned, Schmidgall could not have prevailed.[118] The court of appeals criticized the trial court's reasoning as a "misunderstanding of the final step of the McDonnell Douglas analysis."[119] The court of appeals once again cited *Anderson* and *McGrath*'s motivating-factor standard,[120] noting that "[i]f Schmidgall can prove that it is more likely than not that she was discharged" to obstruct her from seeking workers' compensation benefits or to retaliate against her for seeking them, "she can prevail on her retaliatory-discharge claim *even if she was also discharged for violating the same-shift reporting rule*."[121]

Schmidgall closely resembled the 1998 case of *Abraham v. County of Hennepin*, in which a Minnesota trial court had found that retaliation claims under the MWA and the MHRA could not proceed because the plaintiffs were discharged by their employer,

112. *See id.* at *1–2.
113. *Schmidgall*, 2002 WL 655680, at *1.
114. *See id.* at *1–2.
115. *Id.* at *4.
116. *Id.* at *2–3.
117. *Id.*
118. *Schmidgall*, 2002 WL 655680, at *2–3.
119. *Id.* at *2.
120. *Id.* at *3 (citing Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 626–27 (Minn. 1988); McGrath v. TCF Bank Savs., 509 N.W.2d 365, 366 (Minn. 1993)).
121. *Id.* at *3 (emphasis added).

Hennepin County, for employment misconduct.[122] The trial court did not expressly apply a *McDonnell Douglas* analysis.[123] However, the Minnesota Court of Appeals reversed, noting that a *McDonnell Douglas* analysis was warranted and that the plaintiffs were not required to prove that retaliatory animus was the sole cause—that is, the but-for cause—of their terminations.[124] The court of appeals noted that "[i]f retaliation motivated the county, [the plaintiffs] may prevail *even though the county also had a legitimate reason for the discharges*."[125]

The trial courts in *Holtzman, Lundquist,* and *Schmidgall* all purported to apply a *McDonnell Douglas* analysis to claims of employment discrimination and employment retaliation arising under Minnesota state law. Similarly, *Abraham* appeared to make a decision within the *McDonnell Douglas* framework, even though it did not expressly apply a *McDonnell Douglas* analysis. However, each trial court required the plaintiff to meet a higher burden of proof than the burden actually set by Minnesota law. Of these cases, the most alarming is probably *Lundquist*, which misstated Minnesota's test for the *McDonnell Douglas* pretext stage a full fifteen years after *McGrath* was decided.

Fortunately, in each case the court of appeals recognized the trial court's error and reversed when necessary. None of the cases resulted in a published decision, and none of the cases resulted in review from the Minnesota Supreme Court regarding the court of appeals' application of *McDonnell Douglas*.[126]

d. A Possible Explanation: The Language of *McDonnell Douglas*

Notably, the trial courts in *Holtzman*, *Lundquist*, *Schmidgall*, and *Abraham* shared a common lexicon. Each court implied that the

122. *See* Abraham v. Cty. of Hennepin, No. C8-97-1907, 1998 WL 202771, *1–4 (Minn. Ct. App. Apr. 23, 1998), *aff'd in part and rev'd in part on other grounds*, 639 N.W.2d 342 (Minn. 2002).

123. *See Abraham*, 1998 WL 202771, at *4.

124. *Id.*

125. *Id.* at *4 (citing *McGrath*, 509 N.W.2d at 366 (quoting *Anderson*, 417 N.W.2d at 627)) (emphasis added).

126. *Abraham* and *Schmidgall* were both reviewed by the Minnesota Supreme Court, but neither appeal involved the application of the *McDonnell Douglas* test. *See generally* Abraham v. Cty. of Hennepin, 639 N.W.2d 342 (Minn. 2002); Schmidgall v. FilmTec Corp., 644 N.W.2d 801 (Minn. 2002).

plaintiff needed to prove that his or her employer had a *single* motive—discriminatory or retaliatory animus—for the plaintiff's termination. In *Holtzman*, the plaintiff had to prove that "discrimination was *the real reason* [for the discharge]." [127] Similarly, in *Lundquist*, the plaintiff had to prove that the defendant's proffered reason was "a pretext to cover up *the real reason* for her termination."[128] In *Schmidgall* and *Abraham*, the plaintiffs had to prove that their terminations were solely motivated by animus, independent of their misconduct.[129] This type of single-motive test is functionally a but-for test. It presumes that discriminatory or retaliatory animus do not make an employer's action illegal unless the animus is outcome-determinative.

Several other Minnesota cases employ the same lexicon even while applying the proper motivating-factor test. *Fletcher v. St. Paul Pioneer Press*, a leading case on retaliation under the MHRA, characterizes the plaintiff's burden at the *McDonnell Douglas* pretext stage as "show[ing] that the proffered reasons were not *the true reason* for the [adverse employment] action." [130] This formulation implies that an employer has only one motivation for its actions. Other courts have suggested that plaintiffs must "refute" the employer's proffered reason rather than providing evidence of coexisting motives, [131] demonstrate pretext *in addition to* demonstrating that improper motives were a causative factor in the adverse employment decision,[132] or show that animus motivated an employer "rather than" a lawful reason.[133] All of these formulations

127. Holtzman v. HealthPartners Servs., Inc., No. C7-02-375, 2002 WL 31012186, at *4 (Minn. Ct. App. Sept. 10, 2002) (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515 (1993)) (emphasis added).

128. Lundquist v. Rice Mem'l Hosp., No. 34-C5-00-299, 2007 WL 5688511, Findings of Fact 5 at A-50 (Minn. Dist. Ct. Jan. 30, 2007) (emphasis added).

129. Schmidgall v. FilmTec Corp., No. CX-01-1722, 2002 WL 655680, at *2 (Minn. Ct. App. Apr. 23, 2002), *aff'd on other grounds*, 644 N.W.2d 801 (Minn. 2002); Abraham v. Cty. of Hennepin, No. C8-97-1907, 1998 WL 202771, at *3–4 (Minn. Ct. App. Apr. 23, 1998), *aff'd in part and rev'd in part on other grounds*, 639 N.W.2d 342 (Minn. 2002).

130. 589 N.W.2d 96, 102 (Minn. 1999) (emphasis added).

131. VanGinsven v. City of Canby, No. C9-00-969, 2000 WL 1778310, at *2–3 (Minn. Ct. App. Nov. 21, 2000) (internal quotations omitted).

132. *See* Carter v. Peace Officers Standards & Training Bd., 558 N.W.2d 267, 272 (Minn. 1997).

133. *See* Pinson v. Grazzoni Bros. & Co., No. A03-1567, 2004 WL 1254117, at *7 (Minn. Ct. App. May 28, 2004).

suggest that the plaintiff's burden is greater than merely demonstrating that discriminatory or retaliatory animus was a motivating factor in an employment decision. They resemble language from federal case law requiring plaintiffs to demonstrate that an employer's "proffered legitimate reasons were not what actually motivated its conduct."[134] In other words, they require a plaintiff to prove that retaliatory or discriminatory animus was the sole and but-for cause of an employer's action.

This language is understandable to a certain degree because it is the language of *McDonnell Douglas* itself. *McDonnell Douglas* characterized the pretext stage as allowing plaintiffs to unmask an employer's "coverup" of its illegitimate motive.[135] *McDonnell Douglas* implied that an employer's actions can be explained by a single determinative motive.[136] Accordingly, Minnesota courts looking to *McDonnell Douglas* itself will find language that tends to suggest a but-for test. However, *Anderson* and *McGrath* have modified the plaintiff's burden at the *McDonnell Douglas* pretext stage in ways that *McDonnell Douglas* itself does not describe. Thus, in most cases, terminology that implies that an employer has a single, outcome-determinative motivation for a given employment decision overstates the plaintiff's burden at the pretext stage.

2. Application of a But-For Test at the Eighth Circuit

While the Minnesota Court of Appeals has reversed district-court cases that applied an incorrect test at the *McDonnell Douglas* pretext stage, it cannot reverse federal cases. Unfortunately, a recent federal case applying the *McDonnell Douglas* test to claims arising under Minnesota law has applied a functional but-for test rather than the motivating-factor test that Minnesota law provides.[137]

134. *See* Batson v. Salvation Army, 897 F.3d 1320, 1331 (11th Cir. 2018) (quoting Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)).

135. McDonnell Douglas Corp. v. Green, 411 U.S. 793, 805 (1973) ("[O]n the retrial respondent must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision").

136. *Id*.

137. *See* Naguib v. Trimark Hotel Corp., 903 F.3d 806, 811–12 (8th Cir. 2018).

a. Requiring Plaintiffs to Disprove an Employer's Proffered Reason

In a recent case involving retaliation claims under the MHRA, the Eighth Circuit has described the plaintiff's burden at the *McDonnell Douglas* pretext stage as both discrediting the employer's asserted reason and creating a reasonable inference that retaliatory animus was "the real reason" for the adverse employment action.[138] The Eighth Circuit's test produced different results than the plaintiff would likely have obtained in state court. In *Naguib v. Trimark Hotel Corp.*, Isis Naguib alleged that she was terminated from employment as a housekeeping manager at Millennium Hotel in retaliation for actions such as providing deposition testimony that might have been detrimental to Millennium in past litigation.[139] However, Millennium stated that Naguib was terminated for requiring employees to under-report their overtime hours.[140] The Eighth Circuit held that Naguib could not prevail at the *McDonnell Douglas* pretext stage because she "ha[d] not discredited Millennium's version of events."[141] In other words, because Naguib failed to prove that Millennium's proffered reason was false (and thus that unlawful animus was the *only* reason for her discharge), Naguib was unable to survive the *McDonnell Douglas* pretext stage.[142]

Naguib resembles the Minnesota trial courts' decisions in *Schmidgall* and *Abraham*. In each of those cases, the trial court required the plaintiff to show that an employer's proffered reason for discharging him or her—employment misconduct—was untrue.[143] Like the Eighth Circuit, the *Schmidgall* and *Abraham* trial courts effectively required plaintiffs to show that unlawful animus

138. *Naguib*, 903 F.3d at 811 (citing Pedersen v. Bio-Med. Applications of Minn., 775 F.3d 1049, 1055 (Minn. Ct. App. 2015)).
139. *Naguib*, 903 F.3d at 809–10.
140. *Id.* at 811.
141. *Id.* at 812.
142. *See id.*
143. Schmidgall v. FilmTec Corp., No. CX-01-1722, 2002 WL 655680, at *2 (Minn. Ct. App. Apr. 23, 2002), *aff'd on other grounds*, 644 N.W.2d 801 (Minn. 2002); Abraham v. Cty. of Hennepin, No. C8-97-1907, 1998 WL 202771, at *3–4 (Minn. Ct. App. Apr. 23, 1998), *aff'd in part and rev'd on other grounds*, 639 N.W.2d 342 (Minn. 2002).

was the sole cause of their terminations.[144] However, *Schmidgall* and *Abraham* were reversed on appeal.[145] In each case, the court of appeals reiterated that the plaintiff could prevail at the *McDonnell Douglas* pretext stage if the plaintiff had been discharged for an unlawful reason, *even if* the employer also had a legitimate reason for the discharge.[146] In state court, Naguib might well have prevailed at the pretext stage because she would been required only to demonstrate that retaliatory animus was a motivating factor in her termination.

b. Expressly rejecting the motivating-factor test through "determinative-factor" causation

The Eighth Circuit has also described the plaintiff's burden at the *McDonnell Douglas* pretext stage as discrediting the employer's proffered reason *and* creating a reasonable inference that unlawful animus was a "determinative factor" in the employer's adverse decision.[147] Determinative-factor causation implies a different test than motivating-factor causation. In a recent case involving Title VII retaliation, the Eighth Circuit used the term "determinative factor" as a proxy for the but-for causation test required for Title VII retaliation claims.[148] It expressly contrasted this term with motivating-factor causation.[149] The Eighth Circuit has applied determinative-factor causation to discrimination and retaliation claims under the MHRA.[150]

The Eighth Circuit's divergence from Minnesota's motivating-factor standard is problematic because Minnesota district courts occasionally cite to Eighth Circuit cases in articulating the proper

144. *Id.*

145. *Schmidgall*, 2002 WL 655680, at *4; *Abraham*, 1998 WL 202771, at *5.

146. *Schmidgall*, 2002 WL 655680, at *3; *Abraham*, 1998 WL 202771, at *4.

147. *See, e.g.*, Rothmeier v. Inv. Advisers, Inc., 85 F.3d 1328, 1328 (8th Cir. 1996).

148. Carrington v. City of Des Moines, 481 F.3d 1046, 1053 (8th Cir. 2007) ("At summary judgment, [the plaintiff] must show a 'genuine issue of material fact' that the City's stated reason for the discharge is pretextual and that retaliation was a determinative—not merely a motivating—factor. The record does not support such an inference, and this court declines to adopt [the plaintiff's] weakened standard").

149. *Id.*

150. Macias Soto v. Cork-Mark Int'l, Inc., 521 F.3d 837, 841 (8th Cir. 2008) (retaliation); Cronquist v. City of Minneapolis, 237 F.3d 920, 926 (8th Cir. 2001) (retaliation); *Rothmeier*, 85 F.3d at 1336–37 (age discrimination).

test for the *McDonnell Douglas* pretext stage. While it does not appear that any state courts have actually applied a but-for standard or have purported to apply determinative-factor causation, there is a risk that Minnesota courts may assume the standards are interchangeable and may subject plaintiffs' claims to the very standards rejected in *Anderson* and *McGrath*.

IV. WHAT TEST SHOULD MINNESOTA APPLY?

Minnesota courts—and federal courts applying Minnesota law—have not always faithfully applied the *McDonnell Douglas* test as directed in *Anderson* and *McGrath*. As a result, there is a need for clarity about what test should be applied to claims arising under state law, regardless of which court applies the test. This clarification could come from Minnesota appellate courts reiterating the need to differentiate between state and federal standards at the *McDonnell Douglas* pretext stage. However, it could also involve legislative action specifying the appropriate causation standard, as Congress did when it amended Title VII to create a motivating-factor standard for discrimination claims.[151]

Notably, there are compelling reasons to adopt a but-for test for state-law causes of action whose federal counterparts are analyzed under a but-for standard. However, in light of the broad employee-protective purposes of state laws such as the MHRA, the better public policy is to retain the motivating-factor standard.

A. Reasons to Adopt a But-For Test

To simplify the confusion caused by federal cases construing Minnesota law, Minnesota could directly adopt a but-for causation test at the state level. In fact, Minnesota routinely looks to parallel Title VII law in interpreting the MHRA.[152] The statutes have similar language and a similar purpose,[153] and applying a uniform causation standard for federal and state-law causes of action would promote a

151. *See* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013).

152. *See, e.g.*, Danz v. Jones, 263 N.W.2d 395, 399–400 (Minn. 1978) (adopting the *McDonnell Douglas* analysis for disparate treatment claims); Bhd. of Ry. and S.S. Clerks v. State, 229 N.W.2d 3, 9–11 (Minn. 1975) (longstanding discriminatory employment systems are not "grandfathered in" under the MHRA).

153. Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 441 (Minn. 1983).

clearer understanding among employers and employees about the scope and boundaries of employee civil rights. Notably, the MHRA and the MWA prohibit discrimination and retaliation "because of" an employee's protected traits or "because" an employee engaged in statutorily-protected conduct.[154] A but-for test would be consistent with other cases holding that the word "because" implies a but-for causation standard.[155]

Adopting the federal standard at the state level would alleviate a second concern: the existence of dual causation standards for state-law claims depending on whether the claims are heard in state or federal court. Plaintiffs frequently claim that an employment action violated both state and federal antidiscrimination laws.[156] Additionally, a lawsuit involving state-law discrimination or retaliation claims may end up in federal court because it implicates other federal statutes such as ERISA.[157] As *Naguib* demonstrates, plaintiffs in federal court may have to prove but-for causation at the *McDonnell Douglas* pretext stage even if they would only need to prove motivating-factor causation in state court.[158] Adopting a but-for standard at the state level would eliminate the disparity between Minnesota's application of a motivating-factor test to state-law claims and federal courts' applications of a but-for test to the same claims.

Finally, adopting a uniform standard would minimize the likelihood of juror confusion at trial. Employment discrimination and retaliation questions present complex factual issues.[159] The

154. *See* MINN. STAT. §§ 363A.08, subdiv. 2, and 181.932, subdiv. 1 (2018).

155. *See, e.g.*, Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009); Gentry v. E.W. Partners Club Mgmt. Co., 816 F.3d 228, 235–36 (4th Cir. 2016).

156. *See, e.g.*, Pedersen v. Bio-Med. Applications of Minn., 775 F.3d 1049, 1051 (8th Cir. 2015) (retaliation under Title VII and the MWA); Torgerson v. City of Rochester, 643 F.3d 1031, 1035 (8th Cir. 2011) (race discrimination under Title VII and the MHRA); Hervey v. Cty. of Koochiching, 527 F.3d 711, 715 (8th Cir. 2008) (sex discrimination and retaliation under Title VII and the MHRA); Heimbach v. Reidman Corp., 175 F. Supp. 2d 1167, 1175 (8th Cir. 2001) (disability discrimination under the ADA and the MHRA); Wilking v. Cty. of Ramsey, 153 F.3d 869, 872 (8th Cir. 1998) (disability discrimination under the ADA and the MHRA); Rothmeier v. Inv. Advisers, Inc., 85 F.3d 1328, 1331 (8th Cir. 1996) (age discrimination under the ADEA and the MHRA).

157. *See* Naguib v. Trimark Hotel Corp., 903 F.3d 806, 812 (8th Cir. 2018).

158. *See id.* at 811 (citing *Pedersen*, 775 F.3d at 1055).

159. *See* Sigurdson v. Isanti Cty., 386 N.W.2d 715, 721 (Minn. 1986). Indeed, the factual complexity of employment-discrimination cases was one reason the

United States Supreme Court has noted that workplace-discrimination claims are especially complex for juries.[160] That complexity is heightened when jurors must decide claims under competing theories of liability.[161] Adopting a single standard for analyzing claims at the pretext stage would prevent issue confusion and the need for complex, multi-part jury instructions.

B. Problems with Adopting a But-For Test

Despite the appeal of uniformity, adopting a but-for test under Minnesota's antidiscrimination and antiretaliation laws poses problems. First of all, adopting a but-for test would not guarantee uniformity with federal law. Some federal statutes—notably the ADA and the discrimination provisions of Title VII—do not apply a but-for causation test.[162] Accordingly, the benefits of adopting a uniform standard for the *McDonnell Douglas* pretext stage would not affect litigation involving state-law causes of action and parallel provisions of the ADA or Title VII's discrimination section. This lessened impact is significant because complaints of disability discrimination and race discrimination—both of which would be covered by the ADA and/or Title VII's discrimination provisions—are among the most common MHRA complaints raised in Minnesota.[163]

Minnesota Supreme Court required district courts to make explicit findings at each stage of the *McDonnell Douglas* analysis. *See id.* at 721–22.

160. Vance v. Ball State Univ., 133 S.Ct. 2434, 2451 (2013) ("Courts and commentators alike have opined on the need for reasonably clear jury instructions in employment discrimination cases. And the danger of juror confusion is particularly high where the jury is faced with instructions on alternative theories of liability under which different parties bear the burden of proof").

161. *Id.*

162. *See* 42 U.S.C. § 2000e-2(m). The Supreme Court has not reached the issue of the ADA's causation standard, although federal Circuits have concluded that but-for causation applies. *See* Gentry v. E. W. Partners Club Mgmt. Co, 816 F.3d 228, 235–36 (4th Cir. 2016); Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 961–62 (7th Cir. 2010).

163. *MDHR Enforcement Case Summaries: MDHR Cases with Probable Cause Determinations, 2011-2015*, MINN. DEP'T OF HUMAN RIGHTS 1, 7 (Feb. 2016), https://mn.gov/mdhr/assets/Case_Summaries_Report_tcm1061-229708.pdf [https://perma.cc/5B5A-Y794]. Notably, this report focused on complaints filed with the Minnesota Department of Human Rights (MDHR), the state agency responsible for enforcing the MHRA, and not on private litigation. However, the high number of complaints filed for race and disability

Second, adopting a but-for test would reduce the scope of Minnesota employees' civil rights. But-for causation implies different substantive rights than motivating-factor causation. But-for causation means that civil rights functionally protect employees only when an employer's discriminatory or retaliatory animus is outcome-determinative. Under cases like *Naguib*, a discrimination or retaliation plaintiff may lose even a meritorious case because her employer had a coexisting lawful motive.[164] Motivating-factor causation, on the other hand, means that civil rights are violated when unlawful animus plays a role in an employer's decision, even if the role is not outcome-determinative. Motivating-factor causation implies a broader scope of employee rights: the right against inclusion of unlawful considerations in an employer's decision making, even if the employer could justify its decision on separate grounds.

This broad scope of civil rights—freedom from unlawful considerations—better promotes the purpose of Minnesota's antidiscrimination and antiretaliation laws. The stated public policy of the MHRA, for example, is "to secure for persons in this state . . . freedom from discrimination" in areas of activity including employment.[165] The MHRA creates a statutory civil right to the "opportunity to obtain employment . . . without such discrimination as is prohibited by this chapter."[166] The legislature's broad language—"freedom from discrimination" and "without . . . discrimination"—implies that discriminatory decision making is intolerable even if a discriminatory decision could be justified on other grounds. "Freedom from discrimination" means freedom from discriminatory processes, not just discriminatory outcomes.

Finally, motivating-factor causation better accounts for the practical reality that employers often have multiple motives for a single decision. It is not difficult for employers to articulate a

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discrimination can provide a rough proxy to estimate the proportion of race- and disability-related complaints likely to be litigated. Moreover, the next-most-common claims field with the MDHR are claims of gender or sex discrimination and age discrimination, which could also be covered by Title VII's discrimination provisions.

164. *See* Naguib v. Trimark Hotel Corp., 903 F.3d 806, 812 (8th Cir. 2018).

165. MINN. STAT. § 363A.02, subdiv. 1 (2018).

166. *Id.* at subdiv. 2.

nondiscriminatory or nonretaliatory reason for an employment action.[167] Many can suggest several.[168] *McGrath* and *Anderson* emphasized that the purpose of the motivating-factor standard was to prevent employers who were "definitionally guilty of prohibited employment discrimination" or retaliation from escaping liability by proving that "other legitimate reasons may coincidentally exist that could have justified" the employer's discriminatory or retaliatory action.[169] The motivating-factor standard accounts for this practical reality by clarifying that a plaintiff's claim can prevail even if the employer had a coexisting lawful motive for its actions.[170]

V. CONCLUSION

Minnesota has long utilized a plaintiff-friendly "motivating-factor" standard at the pretext stage of the *McDonnell Douglas* test. This standard allows plaintiffs to prevail on employment discrimination or retaliation claims where an employer's discriminatory or retaliatory animus was a factor in the employer's action, rather than the but-for cause of an employer's action. However, some Minnesota courts have eroded the motivating-factor test by applying a functional but-for test or characterizing the test in language that suggests a but-for test. Federal courts deciding discrimination and retaliation claims arising under Minnesota law have applied a but-for test rather than the proper motivating-factor test.

Minnesota courts should reiterate that the motivating-factor standard is the appropriate test for causation at the *McDonnell Douglas* pretext stage without reference to but-for causation principles. The Minnesota legislature would do well to consider adding express statutory language to the MHRA, the MWCA, and the MWA directing courts to consider plaintiff's claims under a motivating-factor standard. The motivating-factor standard better

167. *See Shifting Burdens*, *supra* note 32, at 1587.

168. *See, e.g.*, Temple v. Metro. Council, 2017 WL 6272716, at *4 (Minn. Ct. App. Dec. 11, 2017) (employee was told he was discharged for (1) failing to properly perform duties; (2) secretly recording conversations; (3) insubordination; (4) failure to provide required notifications; and (5) falsification of records).

169. Anderson v. Hunter, Keith, Marshall, & Co., 417 N.W.2d 619, 626 (Minn. 1988); *see also McGrath*, 509 N.W.2d 365, 366 (Minn. 1993).

170. *See id.*

accounts for the practical reality that employers often have multiple reasons for a single employment decision and better safeguards the employee-protective policies underlying Minnesota's workplace discrimination and retaliation statutes.
